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CORPORATIONS.*

THE PRESIDENT OF THE UNIVERSITY, GENTLEMEN OF THE FACULTY,
STUDENTS OF LAW, LADIES AND GENTLEMEN :

The Yale Bicentennial celebration, recently so happily concluded, and with so much honor, served to bring into prominence the circumstances which attended the founding of the College, and, among others, the difficulties and perplexities which were experienced in regard to the charter. The colonial legislature of Massachusetts had granted in 1636 a charter to Harvard, and was adjudged in consequence by the English High Court of Chancery in 1684 to have committed an act of usurpation. This was one of the grounds for the forfeiture of the charter of Massachusetts. The English courts did not recognize the colonies in America as public governments, but as trading corporations, and therefore denied their right to create private corporations. The good men in Connecticut accordingly took the advice of astute counsel, and when their colonial legislature was asked in 1701 for authority to establish the College they saw to it that the bill was prepared as free as possible of any expressions indicating that it was what it was intended to be.¹

*An Inaugural Address delivered November 1, 1901, by Henry Wade Rogers, LL. D., Professor of Corporations and Equity in the Law School of Yale University.

¹ See Baldwin's *Modern Political Institutions*, note 4, page 184, citing *Papers of the New Haven Colony Historical Society*, vol. 3, p. 413.

They then undoubtedly realized how important it was to have some knowledge of the law of corporations. This did not lead them, however, to establish at once a law school in connection with the new institution. No law school existed at that time within the country, nor was one established until long after. Perhaps the need for one was not particularly urgent, inasmuch as it is very doubtful whether men could then have earned a living in the law. The legal profession had not at that time really come into existence in the new world.

Not until the College was one hundred and twenty-five years old do we find any mention made of a law school connected with it. The catalogue of 1826 announces that "A course of lectures is delivered by the Professor of Law on all the titles and subjects of the Common and Statute Law." It contains, however, no specific statement of the subjects taught, or the text-books used. Not until 1869 did it indicate what books were used, and in the statement then made, no mention is found of a text-book on corporations. But in 1876 the subject of "Corporations" is mentioned for the first time, and made a part of the graduate course. In 1879 the subject was divided and "Private Corporations" became a part of the undergraduate course. Public Corporations continued in the graduate course until 1896, when it was transferred to the undergraduate course.¹ It thus appears to be within twenty-five years that it has been deemed essential to make distinct provision at Yale for instruction in this subject, now conceded to be one of the most important branches of the law. Heretofore the subjects of Public and Private Corporations, now united in the same chair, have been taught by different instructors. To this professorship also belongs Equity Jurisprudence. In speaking exclusively of Corporations on this occasion I am not unmindful that to the lawyer Equity is an equally important and interesting department of jurisprudence.

A corporation is a juristic as distinguished from a natural person. It is an association of individuals, created under authority of law,

¹ Lectures on the subject of Public Corporations were, however, given in the undergraduate course from 1885 to 1896. But the chief work in the subject was done in the graduate course where Dillon on Municipal Corporations was used as a text-book, having been adopted as such in 1883. In 1879 Angell and Ames was adopted as the text-book for the work in "Corporations." It was adopted as a text-book in the Harvard Law School in 1834. The catalogues of Columbia down to 1877-78 make no mention of Corporations as a distinctive subject in the Law School course of that University.

and which for many purposes the law treats as if it were itself a person. This idea of a corporation as a legal entity, distinct from the members who compose it, was an invention of the Romans. The idea was not clearly developed in early Roman law, but during the Republic it became better defined, and the classical jurists fully recognized the corporate obligation and the exemption of the members from individual liability.¹

A distinguished member of the faculty of the Yale Law School has remarked: "That the Romans made the world over again, but among their many achievements none was more durable in its effects on the civilization of mankind than the invention of the corporation as an instrument of government and of trade."²

Ecclesiastical and municipal bodies kept alive this Roman conception, and when the English lawyers came to deal with such associations they applied to them the principles which they found in the Roman law. It has even been said that in no other department of the law did they borrow so copiously and so directly from the civil law. Yet it must be admitted that while the conception was taken "full grown" from the law of Rome, the idea has been developed since with great fullness and ingenuity by the courts of England and the United States.

Old as is the conception of a corporation as an artificial entity distinct from the persons composing it, the law relating to it is nevertheless essentially a development of recent years. Indeed no branch of municipal law has shown greater or more rapid development during the last half century. The subject has been the occasion of much legislation, both constitutional and statutory. It has given rise to an immense amount of litigation which has not been equalled in quantity nor surpassed in importance in any other department of private law. The questions involved have been as novel and difficult as any which the courts have had before them for solution. A comparison of the court reports at the beginning and close of the past century will make it evident that the character of the litigation of the country has been revolutionized in consequence of the development of corporations. The first term of the Supreme Court of the United States was held in February, 1790. From that time to the year 1800 the Court had before it but a single

¹ Howe's *Studies in the Civil Law*, pp. 65, 66.

² Baldwin's *Modern Political Institutions*, p. 141.

corporation case. At the October term of 1899—from October, 1899 to October, 1900—the Court filed opinions in 164 civil cases, exclusive of those to which a public corporation was a party. In 97 of these cases, more than one-half of the whole number, a private corporation was a party. The first volume of Johnson's Reports gives the decisions of the New York Supreme Court, for the year 1806, in 130 cases. Only 20 of this number involved any kind of corporation, public or private. In the four volumes which contain the decisions of the New York Court of Appeals for the year ending May 1, 1901, are the opinions in 222 civil cases, exclusive of those to which a public corporation was a party. In 102 of these cases, nearly one-half of the whole number, a private corporation appeared as plaintiff or defendant.

The corporations known to the earlier English law were mainly the municipal, the ecclesiastical, and the educational and eleemosynary. To all of these originally, the same principles appear to have been applied. It was only in the course of time that differences in the rules of law applicable to each developed, due to the different purposes for which they were designed.

The fundamental distinction of corporations into public and private is nowhere mentioned by Blackstone in his Commentaries, and does not appear to have been known to him when he wrote in 1765. At that time municipal corporations were hardly distinguishable in their legal aspect from private corporations. The cities and boroughs of England were then organized on the same model as the private corporations and they so continued until the Municipal Reform Act of 1835. The distinctions between public and private corporations are largely a development of American law.

The law relating to public or municipal corporations attained importance first in point of time, and that part of the law of private corporations with which lawyers are to-day chiefly concerned has been the latest in development. The first book on the law of corporations was Kyd's work published in 1793. It related altogether to municipal corporations. The first American book on corporations was that of Angell and Ames, published in 1831. In all the books that had been published in England up to that time, and even in the work of Angell and Ames, hardly an allusion will be found to commercial corporations. The commercial corporation, as it now exists, had not then developed to any considerable extent. Its history in this country really begins about 1850. The first general incorporation act under which corporations could be formed for business

purposes was the one passed in New York as early as 1811. But it was limited in its terms to a few specified industries, and it was not until 1848 that the "Manufacturing Corporation Act" was passed in that State, which by its terms was made applicable to associations formed for manufacturing, mining, mechanical, chemical, agricultural, horticultural, medical, mercantile or commercial purposes. New Jersey, two years before, had passed an act for the formation of business corporations. This act, it is said, was the first to make a general provision for the aggregation of capital for the purpose of carrying on business without personal liability.¹

An examination of the list of American charters granted for business purposes prior to 1800,² shows that few indeed were granted for any business purpose and scarcely any for manufacturing purposes. None were granted for the latter purpose by Delaware, Georgia, Maryland, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont and Virginia. Kentucky and New Jersey each incorporated one. Connecticut in 1732 incorporated "The New London Society United for Trade and Commerce in Connecticut," but the charter was repealed the next year. Its only other like charter was to the "Company of the Connecticut Silk Manufacturers," granted in 1789. New York had incorporated two manufacturing "societies," and in addition a "Society for the Promotion of Agriculture, Arts and Manufactures." Three charters were granted in Massachusetts to manufacturing corporations. The colonial legislatures seem to have granted but three charters to corporations for business purposes prior to 1741, when Parliament intervened and prohibited for the future any similar American grants. Between 1800 and 1850 the number of corporations increased slowly as public sentiment was long adverse in this country as in England to the grant of corporate privileges. The opinion expressed by Adam Smith in the *Wealth of Nations* that manufacturing corporations scarce ever fail to do more harm than good was still more or less dominant in the public mind of both countries. This conviction, however, seems to have lost its potency in the United States before it did in England. For Chancellor Kent in his *Commentaries* speaks of the propensity in modern times to multiply civil corporations, "especially in the United States,"

¹ See Mr. Keasbey's paper on New Jersey and the Great Corporations, Reports of Am. Bar Ass., vol. 22, p. 386.

² See *Two Centuries' Growth of American Law*, p. 296.

where he says they have increased "in a rapid manner and to a most astonishing extent."¹ In the only corporation case before the Supreme Court of Pennsylvania in 1827, Mr. Justice Duncan in declaring a foreign attachment act inapplicable to a foreign corporation, remarked: "It is intended for our home made corporations, of which Pennsylvania is an extensive manufacturer, and not for exotic plants, articles of foreign origin and growth."² In 1857, in a case before the Supreme Court of Illinois, Mr. Justice Caton declared it probably true "that more corporations were created by the legislature of Illinois at its last session, than existed in the whole civilized world" in 1800.³ But the number of corporations created in Illinois in 1857 was insignificant as compared with the number now being formed every year in some of the States of the Union.

The number incorporated in New York in 1900 was one thousand eight hundred and sixty-four. In New Jersey the number during the same year was two thousand one hundred and eighty-one, almost all holding under charters perpetual in time. Perhaps it should be mentioned, however, that in the case of one the limit was modestly fixed at one thousand years, and in three others, slightly more modest at nine hundred and ninety-nine years. In the same state during the fiscal year 1901, the number of new corporations chartered has been 2,342. In New York the fiscal year closed on September 30, and the Comptroller of the State has announced that the receipts for the year from the corporation tax law amounted to \$4,966,680.93. More than 6,000 corporations were taxed in the State during the year. In New Jersey the fees paid for registering the charters of incorporation filed in that State in 1899 amounted to \$725,131, and during the present fiscal year to \$558,369.54.

How much of the wealth of the country is now in the possession of the corporations it is quite impossible to say. The Standard Oil Company has outstanding capital of about \$97,500,000, the market value of which is about \$683,000,000. The United States Steel corporation has \$1,018,000,000 of stock capital, having a market value to-day of \$693,100,000. It has in addition \$300,000,000 bonds outstanding, and other issues on subsidiary property. These two corporations alone are possessed of property so enormous in value

¹ 2 Kent's Comm., 272.

² *Bushel v. Commonwealth Ins. Co.*, 15 S. & R. 173, 186.

³ *Railroad Co. v. Dalby*, 19 Ill., 353.

as to be quite incomprehensible.¹ Some years ago Abram S. Hewitt stated that private corporations already owned from one-third to one-half of the capital of the civilized world. In 1887 a distinguished authority in economics declared it within the bounds of moderation to estimate the wealth of corporations in the United States as one-fourth of the total value of all property in the country. He declared that the rapidly increasing proportion of all the resources of the country belonging to corporations was a most significant fact. Another authority about the same time estimated the wealth of corporations as increasing three or four times as rapidly as those of private concerns.² Since these statements were made the wealth of corporations has been enormously increased, and out of all proportion to any previous period in our history. It is perhaps within bounds to say that the corporations of the United States now possess the greater part of the personal, and no small part of the real property, of the country. The total capitalization of one hundred and eighty-three industrial combinations recently formed is stated by the census officials as alone amounting to \$3,085,200,868. At the time the figures were compiled, the United States Steel Corporation had not been organized. The wealth of the United States including real and personal property was under the census of 1890, \$65,037,091,197.^c

The present importance of this subject in the United States is due, not merely to the great number of corporations that have been created and to the great wealth which they possess, but also to the great number of men who are in the service of these corporate organizations, and to the fact that they are conducting the greater part of the business of the country and controlling a large part of its wealth. The last report of the statistician to the Interstate Commerce Commission shows that the American railway corporations alone had in their employ for the year ending June 30, 1900,

¹ Since this address was prepared there has been created under the laws of New Jersey the Northern Securities Company. The capital of this company is \$400,000,000, quoted at early market prices at about \$440,000,000. The three railways it controls have not less than \$642,000,000 outstanding bonds, nearly all selling above par, and many considerably above par. The new organization therefore is practically a billion dollar corporation, the property it controls being not less than \$1,082,000,000.

² See the article by Dr. R. T. Ely in *Harper's Monthly*, June, 1887.

^c The figures under the census of 1900 are not yet accessible.

more than one million men.¹ According to the averages adopted in such cases it is a fair estimate to say that not less than five million individuals in the United States derive their support from the railway corporations alone. The roads disbursed in wages in 1900 the enormous sum of \$577,264,841. The total amount of their disbursements for the year for everything entering into operating expenses was \$961,428,511. The aggregate amount of the capital invested in the railroads of the country was \$11,692,817,066. The figures given do not include the street railways in which an enormous amount of capital is invested, and which give employment to an army of men.

The law of corporations is a more important and extensive branch of jurisprudence in the United States than in any of the other countries of the world. It is conceded in England, I understand, that American lawyers have dealt more satisfactorily with the subject than has the English bar. It is remarkable that no comprehensive treatise has appeared in England on the subject of Private Corporations, since Mr. Grant wrote his work in 1850, although a number have appeared on Municipal Corporations.²

The greater importance of this subject in this country is due in part to the greater number of corporations which exist here, and the more extensive operations which they carry on. The American policy of providing general incorporation laws under which corporate franchises may be obtained on equal terms by all who wish them, has contributed to this result. In England it has not always been possible to obtain corporate franchises with equal freedom.

The English writer on the law of corporations, Mr. Grant, speaks of a corporation as "an invention which, perhaps more than any other human device has contributed to the civilization of Europe, and the freedom of its States." I do not think that this tribute, high as it is, is undeserved. He amply justifies it by saying that—"By this means municipalities were furnished with a form of government that never wore out; charitable trusts were secured to the objects of them so long as such objects should continue to be found; the protection and encouragement of trades and arts were permanently provided for; and learning and religion kept alive and cherished in

¹ The exact number was 1,017,653.

² Some works have been published on The Companies Act. There is also the important work of Mr. Brice on *Ultra Vires*.

times through which, probably, no other means can be mentioned that would appear equally well qualified to preserve them.”¹

We cannot, however, ignore the fact that the civilization which the corporations have done so much to develop they have from time to time done much to imperil. We know that at Rome their effect on the social and economic life came at length to be evil. Gibbon tells us that the Romans came to regard private corporations with “the utmost jealousy and distrust.”² “Down with Corporations!” became a familiar cry, and in the year 64 B. C. a statute was enacted which dissolved most of them. They were afterwards revived. But in the times of Julius Cæsar a restrictive policy was again adopted respecting them. In England conveyances and devises to corporations, civil or ecclesiastical, were forbidden by the Great Charter; and numerous statutes of mortmain, beginning in 1225 and running down to the mortmain act passed in 1736, give evidence of hostile feeling. In the United States the voices of not a few thoughtful men have spoken, if not words of alarm, certainly words of caution, as to the possible dangers which threaten us from corporate organizations. Mr. Justice Brown of the Supreme Court of the United States in the address which he delivered before the graduating class of this Law School in 1895, named three perils which, in his opinion menaced the immediate future of the country and even threatened the stability of its institutions. Two of the three then mentioned were municipal misgovernment and corporate greed. In the Bicentennial Commemorative address of Mr. Justice Brewer, comment was made upon the enormous financial consolidations of the present time and the corresponding organizations of labor, and the opinion was expressed that this centralizing tendency was antagonistic to the Republic and not consistent with popular government.

The subject of corporations, both public and private, is to-day commanding the profound attention of the lawyer and the statesman alike. The power which private corporations possess is so great and their capacity for mischief is so boundless that serious men have realized the absolute necessity which exists in this country of devising restraints for the protection of society. Take by way of example the railroad corporations. It is within their power to construct the industrial map of the United States. They can practically decree at what places any industry shall be conducted. As one

¹ Grant on Corporations, p. 4.

² Decline and Fall of the Roman Empire, vol. 2, p. 168.

writer has expressed it, railroad rates "have become the air which industries breathe." The railroad, by the rates they make, can decide whether the butter consumed in New York City shall be produced in New York State or in Michigan, whether western merchants who buy their goods in New York City shall have an advantage over those who buy them in Boston or Philadelphia; whether the dairy products consumed in Chicago shall come from New York or Wisconsin. The time was and probably still is when the railroads can dictate not merely where industries can be carried on, but by whom they can be carried on. In the case of the Standard Oil Company, it is no secret that the great monopoly that Company possesses was built up by discrimination in freight rates, made by the railroad companies upon the demand of the Standard Oil Company in order to crush out independent refiners. In the course of a year and a half the Company received from the railroads, it is said, \$10,000,000 in rebates. Congress, in 1887, created an Interstate Commerce Commission with the view of regulating the roads, but gave the Commission no power to enforce its findings. Under the law as interpreted by the Supreme Court the Commission has no authority to declare what are reasonable rates or regulations, and it is practically optional with the carrier whether the decisions of the Commission shall be complied with. It seems inevitable that sooner or later it will be found necessary to invest the Commission with power to make changes in the rates when existing charges are found to be unreasonable after a full hearing of all the parties in interest, and to put the changes into immediate effect and continue them in force until otherwise ordered by the courts on appeal. That there is a growing sentiment throughout the country in favor of public ownership of the roads cannot be denied. It is not likely to become predominant unless the people become convinced that no other method will afford the necessary protection against unjust discriminations and unreasonable rates.

The tendency of the times is in the direction of railway consolidation. Congress made this inevitable when it undertook to suppress pooling instead of allowing and regulating it. What has been said indicates the danger which such consolidation involves. Mr. Justice Cooley, at the time Chairman of the Interstate Commerce Commission, alluded to the danger in an address he delivered in 1889 before the Merchants Association of Boston. Speaking of trusts, he said:

"They are of course a feature of the times to which all thoughtful men must now be giving some attention, but at this time I do not care to

dogmatize on the subject. A few things can, nevertheless, be said of trusts without danger of mistake. They are things to be feared. They antagonize a leading and most valuable principle of industrial life in their attempt not to curb competition merely, but to put an end to it. The course of the leading trusts of the country has been such as to emphasize the fear of them, and the benefits that have come from its cheapening of an article of commerce are insignificant when contrasted with the mischiefs that have followed the exhibitions in many forms of the merciless power of concentrated capital. And when we witness the utterly heartless manner in which trusts sometimes have closed manufactories and turned men willing to be industrious into the streets in order that they may increase profits already reasonably large, we cannot help asking ourselves the question whether the trust as we see it is not a public enemy; whether it is not teaching the laborer dangerous lessons; whether it is not helping to breed anarchy?

* * * * *

Anything in the nature of a trust, that should bring the railroads of the country, or of any considerable section of the country under a single head, with irresistible power to divide business and make rates, would be more to be dreaded than any other trust ever formed or proposed. The reason is obvious; it would control more property, have more power of controlling and coercing the action of individuals and of the public authorities.

* * * * *

No prudent man would give assent to a railroad trust until he was first shown that very effective legal restraints had been put upon it."

But the process of railway unification goes on seemingly without hindrance and with rapid strides. Within the past two years not less than three-fifths of the entire railway mileage of the United States has been brought under the control of five great capitalists. What the final outcome is to be no man is wise enough now to predict.

We have witnessed in the past few years a remarkable industrial movement in the United States. I refer to the combination or consolidation under a single corporate management of a number of manufacturing plants engaged in the same line of industry. The census of 1900 shows that 183 corporations controlled 2,147 distinct plants, and that fifty per cent. of these combinations were organized between January 1, 1899, and June 30, 1900. The manufactured product of these industrial combinations in 1900 was declared by the census officials to be equivalent to 20.4 per cent. of the total gross products of the manufacturing industries of the country as they existed in 1890. The formation of these combinations, and the organization of the United States Steel Company perfected since the census statistics were gathered, have given great prominence to the questions which relate to trusts. The speech which the President of the United States made a few months ago in Minneapolis,

although he had not then succeeded to the office, is indicative of a feeling which day by day is becoming more widespread among our people. He said:

"More and more it is evident that the State, and if necessary the Nation, has got to possess the right of supervision and control as regards the great corporations which are its creatures, particularly the great business corporations which derive a portion of their importance from the existence of some monopolistic tendency."

That trusts may result in a saving of the wastes of competition is no doubt a good. Against that good, however, are possible evils of great magnitude—the evil of stock watering, of high prices to consumers because of monopolistic power, of low prices to producers of raw material which the combination as being the largest buyer can compel the producer to accept, lower wages to the laborer, and above all the powerful if not corrupting influence which may be exerted over political organizations, and over every department of government, the executive, legislative and judicial.

That the people and their representatives are giving serious consideration to the problem is made evident by the large amount of legislation respecting corporations which has taken place in this country within the last few years. Thirty states, within the past eleven years, have passed laws intended to prevent the industrial combinations known as "trusts." Some of the number have adopted constitutional provisions upon the same subject. Congress also has interfered, enacting in 1890 an Anti-Trust law, known as the Sherman Act. It seems to be quite generally agreed that the laws already enacted have had very little practical effect. We are not only concerned as lawyers with what has been enacted, but the opinions of lawyers will doubtless be potential in determining, perhaps, not what should be done, but what can constitutionally be done, and what is within the scope of federal legislation as compared with that of the States.

The Sherman Act was necessarily confined in its operation to commerce and trade with foreign nations, between the several States, and in the Territories. When the Supreme Court came to construe the act¹ it found it inapplicable to the industrial and manufacturing corporations of the country. The reasons the Court assigned in support of its conclusion show plainly it is not within the constitutional power of Congress to so amend the act that it can be made

¹ United States v. Knight, 156 U. S. 1 (1894).

applicable to this class of corporations. The grant to Congress is a power over commerce and not over manufactures. An attempt to monopolize the manufacture of an article which may afterwards become an article of commerce is not an attempt to monopolize commerce in that article. Commerce and manufactures are distinct matters. Commerce only succeeds to that which the manufacturers produce. Congress may regulate the former, but under the Constitution the regulation of the latter remains with the States. As the manufacturers of a given article are relatively few while the dealers in the manufactured product are many a monopoly through the manufacturers rather than through the dealers is the evil against which it is most important to guard, and in respect to which the Sherman Act is, and must remain, ineffective. As construed by the Supreme Court in 1899 this Act is applicable to agreements or combinations which directly operate, not alone upon the manufacture, but upon the sale, transportation and delivery of an article of interstate commerce by preventing or restricting its sale.¹

That the laws have had little effect in remedying the evils they were intended to correct has not been due to their maladministration by the judiciary. The courts of last resort have not fallen under the influence of the corporations, but have fearlessly and honestly administered the law.

The industrial combinations were first organized through "trusts." Where the end sought was to bring under one management a number of corporations engaged in the same business the holders of the stock in each of the constituent companies placed their stock in the hands of a trustee or board of trustees, accepting from the latter stock certificates. The trustees held the legal title to the stock and voted it. They elected the officers of the constituent corporations, and thus controlled the business of each of them. They received the dividends on the stock and paid the dividends on the stock certificates. The courts had no hesitancy in pronouncing such combinations illegal upon well known principles of law and without reference to any special or hostile legislative enactments. The New York Court of Appeals so pronounced in the case of the Sugar Trust in 1890,² and the Supreme Court of Ohio in 1892, in that of the Standard Oil Trust.³

¹ Addyston Pipe & Steel Co. v. United States, 175 U. S. 211.

² People v. North River Sugar Refining Co., 121 N. Y., 582.

³ State v. Standard Oil Co., 49 Ohio St., 137.

This was not all. The courts in a number of cases decided that the common law made it illegal for a single corporation, authorized to carry on a particular business and to acquire property in the State in which it was chartered and elsewhere, to enter into a scheme of getting into its hands all like properties in the country with a view of establishing a virtual monopoly of the business. Upon this principle the Supreme Court of Illinois affirmed a judgment of ouster against the corporation through which the "Whiskey Trust" was carrying on its operations.¹ A like principle was recognized in Michigan in a case which involved the Diamond Match Trust.²

But the "trusts" thus adjudged illegal found they could organize under the laws of New Jersey, and hold real and personal property and carry on business outside as well as inside that State. They transferred their property to corporations organized under the laws of that Commonwealth, and were thus enabled to accomplish the purposes which the courts of other states had pronounced illegal, as being in restraint of trade and contrary to the common law. The corporation laws of that State, which had come to be known as the "Snug Harbor" of the trusts, offered them among others, the following inducements:

1. A New Jersey corporation was given express authority to purchase, hold and sell the stock or bonds of other corporations of a similar character. It thus could acquire the control of the property and business of other corporations.
2. The corporation was under no obligation to make known to the public the precise condition of its affairs by any published statement, at stated intervals, of the amount of its capital stock actually paid in, and of its existing debts and assets.
3. No limit to the duration of the corporation was imposed.
4. Express authority was conferred to issue stock in payment for property purchased, which made it possible to acquire without a cash payment the property of like corporations.
5. Authority was given to the corporation to lease its property and franchises to any other corporation.
6. The tax laws were liberal.
7. The statutes relating to conspiracy had been amended so as to omit all mention of acts injurious to trade or commerce.

¹ Distilling, etc., Co. v. The People, 156 Ill., 448.

² Richardson v. Buhl, 77 Mich., 632 (1889).

Of all these inducements no doubt the strongest is that which allows the purchase of the stock of other corporations. It is under this provision that the Standard Oil Company, the Distilling Company of America, the United States Steel Company, and other great trusts organized as New Jersey corporations, are to-day carrying on successfully their operations.

New Jersey, however, has not been the only State which has held out inducements in the direction indicated. Delaware, West Virginia, Maine, and of late New York, have followed the example. Connecticut has also been sometimes mentioned as among the States having a liberal policy in this matter, and which are known as "charter-granting" States. But New Jersey has attracted the largest corporations, and no doubt has incorporated the greatest number. At the present time there are said to be more than 15,000 corporations in the United States, operating under New Jersey charters, and having authority to issue stock aggregating nearly \$8,000,000,000. Comparatively few of these are operating in the State itself. Corporations are incorporated within the State to carry on operations outside the State which they are not at liberty to carry on within the State. The result is a surplus in its treasury, with no necessity for State taxes.

Corporations will continue to exist and "trusts" will continue to be formed. There are careful and profound students of economic questions who do not hesitate to say that trusts are the most effective agencies yet devised for preventing the wastes of competitive production, and that their destruction would probably be the death blow to our hopes for industrial leadership in the international struggle for future mastery.¹ They tell us that the possession of vast capital by productive combinations is a necessity, and that the law should allow free opportunity for combination, seeing to it that the methods of combination are "fair, clean, and honorable." In the opinion of as wise a man as Mr. Justice Brewer, the trusts "have come to stay." It is not without considerable significance that the legislature of New York a year ago so changed the laws affecting corporations in that State that agreements are now authorized for pooling stock or creating voting trusts, and that the issue of certificates of beneficial interest in lieu of stock deposited with the trustee and the purchasers of corporate mortgage bonds are protected under a provision that a mortgage given by the corporation becomes valid,

¹ See Professor Sherwood's article in *The Yale Review*, Feb., 1900, p. 362.

after it is recorded for a year and the interest is paid thereon, notwithstanding any irregularity in its execution. The Connecticut Corporation Act of 1901 makes provision for the consolidation and merger of corporations. This legislation indicates that in these two commonwealths at least the people do not share at the present time in that fear of corporations which in so many of the States has led to hostile enactments.

The question before the American people to-day is not one of suppression, but one of regulation and control. What restraints should be imposed it is no easy matter as yet to say. But the most intelligent students of this subject concede that control must be exercised, and that probably it may best be exercised through a national corporation law which will subject all corporations to substantially the same requirements. First and most important of these should undoubtedly be publicity. The public should, in every instance, have reliable information as to the amount of the capital issued, and the amount paid thereon in money, and the arrears, if any, of calls due. They should know how the corporation has invested its money, what its assets are, and the amount of its debts, as well as the names of its stockholders. This information could not injure a sound corporation, and would afford that protection against unsound ones to which the public is certainly entitled.

The people of this State have recently voted in favor of a constitutional convention. I venture to think that when that convention assembles after it has disposed of the perplexing question of representation, and comes to the consideration of other important matters that must receive careful attention, it will find it necessary to give no little thought and serious study to the subject of corporations. If it does not it will be distinguished in this respect from every other constitutional convention which has been held in this country during the last quarter of a century.

When the existing constitution of Connecticut was drafted in 1818 corporations in the United States were few in number and the necessity of constitutional limitations respecting them had not become manifest. No restraints were then enforced and none afterwards by constitutional amendment until 1877, since which time no further restraint has been added. The amendments referred to prohibit any county, city, town or borough from owning the stock or bonds of any railroad company and from making any donations to such corporations. The Legislature of Connecticut can still incorporate by special laws and the charters it grants may be in such terms

as to preclude subsequent modification in the legislative discretion.

The constitutions adopted in New York in 1894, in South Carolina in 1895, in California in 1896, in Delaware in 1897, in Louisiana in 1898, and that now pending before the people of Alabama¹ all contain many restraints imposed upon both public and private corporations.

The American statesman and the American lawyer is no less concerned over the problems which relate to public corporations. There are not a few who deem the government of great cities the chief problem of civilization. The history of the government of American cities gives occasion for deep concern to every thoughtful citizen. City government in the United States is extravagant, inefficient, and corrupt. How to remedy these conditions is the problem which perplexes. In this connection it becomes necessary to consider whether the control of municipal government and the responsibility for good or bad administration shall rest with the people of the municipality or with the legislature. It is a question of local rule by the people of the locality as against a theory of government of the city by the State. The question of municipal ownership of public institutions is one of great concern to the people who live in cities. The corporations which control transportation, gas, electricity, and the telephone in our municipalities have so gained in power as to overshadow the government of American cities.² The Supreme Court of Illinois has recently rendered a decision sustaining the issuance of a mandamus to the State Board of Equalization compelling it to assess twenty-three public service corporations in the city of Chicago, having a capital stock estimated to be worth \$368,000,000, and which had been exempt from bearing their full share of taxation for nearly thirty years. Concerning the questions which involve home rule and municipal ownership the people depend upon the lawyers for advice. Already some most important decisions have been rendered in New York and Michigan upon questions of municipal ownership, and the cases are not a few as to the constitutional right of local home rule.

The increasing importance to the statesman and the lawyer of the subject of municipal corporations is revealed by an examination of the census tables of the United States. In 1890 there were in

¹The Alabama Constitution has since been adopted.

²See *Atlantic Monthly*, April, 1901, p. 583, Mr. Edwin Burritt Smith's article on The Next Step in Municipal Reform.

this country 7,578 incorporated places, while in 1900 the number was 10,602. The number of inhabitants living in incorporated places in 1900 was 35,849,516 as compared with 26,079,828 in 1890. In the State of New York 47.3 per cent. of the population live in the city of New York. In 1790 the per cent. of the population of the United States living in cities of 8,000 inhabitants and over was 3.35; in 1850, 12.49; in 1890, 28.5; and in 1900, 32.4.

That municipal corporations, like the ecclesiastical, the eleemosynary and the educational corporations, were known to the earlier English law, and the private trading corporation to the much more modern law, has already been remarked. History shows the existence of towns and cities at a very early period, and that even Phoenicia and Egypt were famous for their large and splendid cities. It is necessary to remember, however, that the towns and cities of early times did not possess charters of incorporation. The most ancient municipal charter of incorporation now extant was granted by Alfonso V. in 1020 to the city of Leon in Spain, and in England the charter of Kingston-on-Hull in 18 Henry VI. was the earliest charter of municipal incorporation granted in England. Before that time the cities and towns of England possessed only a *quasi* corporate character.

I have heretofore called attention to the fact that to all the corporations known to the earlier English law the same principles were originally applied, and that in course of time differences in the rules of law applicable to the different kinds of corporations were developed from the different purposes each was intended to fulfill. It is not my purpose to remark upon all these differences, although I shall in conclusion point out in what some of them consist.

1. Membership in private corporations is voluntary, and in public corporations involuntary. In private corporations membership rests upon contract. In public corporations it usually is constituted by living within the municipal limits, and that without regard either to the wishes of the individual himself, or of his fellow citizens, who may regard him as a most undesirable acquisition.

It is a curious fact that membership in a public corporation ever should have been in any way dependent upon membership in a private corporation, or that the government of public corporations should have been to any extent in the hands of private corporations. Yet the history of Europe, of its towns and guilds, proves this was once the case. The guilds were private corporations and controlled the government of medieval towns. Time was when "the citizens and the guild became identical; and what was guild-law became the

law of the town."¹ In the time of Edward II. an ordinance of London provided that no person, whether an inhabitant of the city or otherwise, should be admitted to the freedom of the city unless he were a member of one of the trade gilds. In the 49th Edward III. an enactment was passed which transferred the right of election of all the dignitaries and officers of the city of London from the ward representatives to the trading gilds or companies. Dr. Albert Shaw, writing upon Municipal Government in Great Britain, in speaking of the city of London, declares that the affairs of the municipal corporation still remain practically in the hands of the gilds.² The members of the gilds once elected the aldermen and common councilmen as well as the lord mayor, but recent legislation has made it possible for resident householders to assist in the election of the aldermen and common councilmen. While the aldermen elect the lord mayor, they are restricted in their selection to one out of two named by the gilds.

2. The fundamental proposition which underlies the law of corporations, both public and private, is that legislative sanction is absolutely essential to lawful corporate existence. The public welfare requires that no corporate powers shall be exercised except for purposes and under conditions previously determined by the legislature. While an incorporating act is essential in all cases, the act cannot alone create a private corporation; the assent of the members must be secured. But the incorporating act is alone sufficient to establish a public corporation. In this case the assent of the individuals affected is not essential.

3. The consolidation of one corporation with another can only be effected by legislative authority. When this authority has been conferred the consolidation of one private corporation with another cannot be accomplished without the unanimous consent of the members, in the absence of some previous agreement to the contrary. But the consolidation of public corporations is within the exclusive power of the legislature, unless the constitution of the State otherwise provides.

4. A private corporation's charter is a contract which the legislature cannot impair. The charter of a public corporation is not a

¹ English Gilds, p. xciii.

² Municipal Government in Great Britain, p. 225, it says: The membership of the gilds in 1894 was 8,800, their property holdings exceeded \$100,000,000, and their income is said to amount to \$5,000,000. Few of the members have any connection with the trade to which they belong. There are generals who are haberdashers, and scientists who are fishmongers.

contract, and may be amended or repealed by the legislature at its pleasure.

5. The charter of a private corporation may be forfeited by the courts upon cause shown. But the courts possess no such power over the charter of a public corporation.

6. Public corporations are created for governmental purposes. They are agencies of the State in the administration of public affairs, and are primarily created for the benefit of the State. Private corporations are not primarily created for the benefit of the State, nor are they intended to aid in the administration of the affairs of the State. They are intended rather to promote the individual welfare of the corporators.

7. In the case of private corporations the grant of a corporate franchise is the grant of a special privilege which presumably has pecuniary value. To grant it is to prefer over other individuals the persons to whom the grant is made. It is not in accordance with our democratic theories that government should confer special favors on particular individuals. All persons are entitled to equal opportunities. This is one reason why in many of the States the legislature is prohibited from incorporating private corporations by special act, while free from like restraint as respects the incorporation of those that are public.

8. A private corporation holds its property subject to all the constitutional guaranties which protect the property of an individual. But the property which a public corporation holds in its public capacity is so far subject to legislative control that it may be transferred to some other agency of government to be used for similar public purposes; and this can be done without any compensation to the corporation thus divested of its property against its will.

9. Upon the dissolution of a private corporation having stockholders, its property after the payment of its debts is distributed among its members according to their respective interests. But upon the dissolution of a public corporation its property passes under the immediate control of the State.

10. The better opinion is that the legislature cannot delegate to a private corporation the power to tax.¹ But its right to delegate such power to public corporations is nowhere denied.

¹Harward v. St. Clair &c. Drainage Co., 51 Ill. 130, 135. In this case the court say: "If it be a tax, as in the present instance, to which the persons who are to pay it have never given their consent, and imposed by persons acting under no responsibility of official position, and clothed with no authority of any kind by those whom they propose to tax, it is to the extreme of such tax, misgovernment of the same character as our forefathers thought just cause of revolution."

a. The power to tax cannot be used for the benefit of a private corporation, except it be one which serves, like a railway, a public purpose. But the power to tax for the benefit of a public corporation is everywhere conceded.

b. The taxing power of the Federal Government extends to the property of private corporations. But that power cannot be exercised to tax a public corporation created by a State, or the salary of one of its officers.

c. A State tax law applies alike to the property of individuals and of private corporations. But it is not to be construed as applicable to the property of public corporations, unless made so in express terms.¹

11. A private corporation, as a rule, cannot be authorized under the power of eminent domain to condemn the property which it desires to use in the promotion of its purposes. This can be done only when the corporation, like a railway, serves a public purpose. But a public corporation may be invested with authority to acquire through condemnation proceedings whatever property it may need for municipal purposes.

12. The principle that a contract beyond the scope of the corporate power is void and that those who contract with the corporation must at their peril inquire into its power or that of its officers to make the contract, is more strictly applied to public than to private corporations.

a. The legislature cannot in the case of a private corporation make a contract for it or compel it to incur indebtedness without its consent. In the case of a public corporation it may be beyond the legislative authority to compel it to contract a debt for a strictly local purpose without its assent. But without such assent it may be compelled to incur indebtedness for an improvement of a general and public character.

b. A private corporation has implied authority to borrow money for purposes properly within the scope of its business. But the better opinion is that a municipal corporation has no implied power to borrow money for its ordinary purposes.

c. A private corporation has, in the United States, implied authority to issue negotiable paper whenever this is an appropriate

¹ *People v. Brooklyn Assessors*, 111 N. Y. 505.

means of accomplishing the corporate purposes. But a municipal corporation has no implied power to issue negotiable paper.¹

d. A private corporation, as a general rule, has a right to sell or mortgage the property it holds for corporate purposes, unless as in the case of a railroad, it is charged with a public duty. In that case it cannot alienate the property which is essential to the performance of that duty. A public corporation, on the other hand, cannot as a rule sell or mortgage the property which it holds, except that which it possesses in its private capacity.

13. For its torts a private corporation is liable according to the principles which determine the liability of a natural person. But public corporations possess an immunity which is peculiar to themselves. Those known as *quasi* corporations, such as counties, townships and school districts, are not liable for torts except as the liability is imposed by statute. Those known as municipal corporations proper are, as a rule, not liable for the torts of agents when acting in a governmental capacity. This immunity, however, does not extend to the misfeasance or non-feasance of agents as respects corporate as distinguished from governmental duties.

A private corporation is liable to exemplary damages. But it is difficult to conceive of a case in which a municipal corporation could be liable in a similar manner.

14. The judgment creditor may enforce his judgment against a private corporation by writ of execution levied upon its property. But the creditor of a public corporation cannot ordinarily proceed in a similar manner, as the property which the corporation holds in its public capacity cannot be taken on execution to satisfy its debts. His remedy is by mandamus to compel the payment of the judgment, or a levy of a tax by which the judgment may be satisfied.

15. The statutes of limitation run against a private corporation as against a natural person. But the better opinion is that such statutes do not apply to public corporations as respects public rights, although applicable to rights of a private nature.

In entering upon the duties of this chair I am impressed by the fact that there are few subjects in the law which present so many difficulties and concerning which there is so great a conflict in the decisions as in the law relating to corporations. I am not unmindful

¹ Brenham v. German American Bank, 144 U. S. 173.

of the responsibility which is devolved upon me. Neither am I insensible to the honor which attaches to a professorship of the law in one of the oldest and greatest of American universities. We are told that in the most shining periods of the Roman republic men of the first distinction taught the science of law openly in their houses as in so many schools. From that day to this we have the inspiration of the great names of those who in every country of Europe as well as in the United States have engaged in the teaching of law. Mr. Justice Wilson of the Supreme Court of the United States in accepting a professorship of law in the University of Pennsylvania in 1790 declared: "By my acceptance of this chair, I think I shall certainly increase my usefulness, without diminishing my dignity as a judge; and I think, that with equal certainty, I shall, as a judge, increase my usefulness, I will not say my dignity, in this chair." A work which has attracted men of the highest eminence and the greatest gifts, should not be entered upon without a due sense of its responsibilities and significance, and a determination to discharge faithfully the duties which the position involves.